Ooi Poh Ean & Anor v Lembaga Pembangunan Langkawi

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K-02–2692–12 OF 2013
HISHAMUDIN YUNUS, DAVID WONG AND UMI KALTHUM JJCA
18 DECEMBER 2017

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Land Law — Malay reservation — Whether dealing contrary to enactment — Kedah Enactment No 63 (Malay Reservations) ('the Enactment') — Section 6 of the Enactment declared, inter alia, that no dealing in reservation land 'held by a Malay' could vest any right or interest in that land in any person who was not a Malay — Whether s 6 could not invalidate transaction where reservation land was held by non-Malay and transferred to another non-Malay — Whether in such event registration of title in non-Malay's name gave him indefeasible title absent any challenge on basis of fraud, forgery or misrepresentation under s 340(2) of the National Land Code — Whether party who held property as bare trustee for its beneficial owner had no capacity to pass good title to property to third party

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A contract between the respondent ('LADA') and a company ('Pen Pen') required the latter to buy two double-storey houses on LADA's behalf. Pen Pen bought the two houses ('house No 72' and 'house No 73') ('the two properties') from a developer ('Landrise'). The purchase price for the two properties was fully paid by LADA but they remained registered in Pen Pen's name. Pen Pen later entered into sale and purchase agreements ('SPAs') to sell the two properties to the appellants ('Poh Ean' and 'Eik Hong') — house No 72 to Eik Hong and house No 73 to Poh Ean — for RM130,000 each. House No 72 was transferred into Poh Ean's name as nominee for Eik Hong but the transfer of house No 73 to Poh Ean personally was not done. LADA sued Pen Pen and the appellants in the High Court for, inter alia, a declaration that LADA was the lawful, beneficial and equitable owner of the two properties which fell under Malay reserve land; that Pen Pen's SPAs with the appellants were void as was the transfer of house No 72 into Poh Ean's name; that the two properties should be transferred back into LADA's name as it had fully paid for their acquisition; and that damages payable by Pen Pen and the appellants to LADA had to be assessed. The High Court allowed LADA's claims and ruled that: (a) the two properties were Malay reserve land; (b) the SPAs between Pen Pen and the appellants and the transfers of the land from Landrise to Pen Pen and from the latter to Poh Ean were all void under the Kedah Enactment No 63 (Malay Reservations) ('the Enactment'); (c) LADA was the beneficial and equitable owner of the two properties; and (d) the appellants were not bona fide purchasers without notice but constructive trustees for LADA. In the instant appeal against the High Court's decision, the appellants argued that s 6 of the Enactment had no application to the case because what was struck down by

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A that section was a dealing in land held 'by a Malay' to any person who was not a Malay. It was argued that in the present case, the land in question were all the while held by non-Malays. It was also pointed out that the land office had transferred the two properties from Landrise to Pen Pen without any issue although both parties were non-Malays. Consequently, it was argued, Pen Pen
B had acquired good titles to the two properties and, consequently, had the right to transfer the two properties to the appellants as bona fide purchasers for value and the appellants acquired indefeasible titles as a result.

C **Held,** allowing the appeal in part, finding that Poh Ean was the rightful owner of house No 72 and ordering LADA to transfer that property to Poh Ean within one month of the date of this order and affirming the High Court's decision with regard to house No 73:

(1) The court agreed with the appellants that s 6 of the Enactment had no
D application to the land in question. Section 6 provided very clearly that it applied in a situation where any Malay reserve land was held under a document of title 'by a Malay'. Since the land in the instant case were registered in Pen Pen's name, which had not been declared to be a Malay pursuant to s 19 of the Enactment, LADA's reliance on s 6 to invalidate
E the land transactions was misconceived (see para 22).

(2) The court agreed with the findings of the trial court that Pen Pen had bought the two properties from Landrise on behalf of LADA using LADA's money. Pen Pen should have transferred the properties to LADA
F but it failed to do so and instead unlawfully sold the two properties to the appellants. With regard to Poh Ean's registered title over house No 72, the transfer of the title from Pen Pen to Poh Ean was protected by s 340 of the National Land Code ('the NLC') and could not be defeated under s 340(2) of the NLC since fraud, forgery or misrepresentation etc was not
G pleaded by LADA. In other words, Poh Ean's title to house No 72 became indefeasible upon registration of the title. Since house No 72 was transferred to LADA pursuant to the trial court's order, this court ordered LADA to transfer the said property back to Poh Ean within one month of the date of this order (see paras 24–26 & 28).

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(3) With regard to Poh Ean's 'rights' over house No 73 (which, pursuant to the order of the trial court, was transferred to LADA), since LADA had paid the full purchase price for the said property to Pen Pen, LADA was the beneficial owner of that property and Pen Pen became the bare trustee
I of it for LADA's benefit. Being a bare trustee, Pen Pen had no good title to sell and transfer house No 73 to Poh Ean and the latter did not acquire any interest in the property. This court therefore held that the transfer of house No 73 to LADA was correctly done and that LADA's title to it had become indefeasible (see paras 29–30).

[Bahasa Malaysia summary

Satu kontrak antara responden ('LADA') dan sebuah syarikat ('Pen Pen') menghendaki Pen Pen membeli dua rumah dua tingkat bagi pihak LADA. Pen Pen telah membeli dua rumah itu ('rumah No 72' dan rumah No 73') ('dua hartanah tersebut') daripada pemaju ('Landrise'). Harga belian untuk dua hartanah tersebut telahpun dibayar sepenuhnya oleh LADA tetapi masih didaftarkan dalam nama Pen Pen. Pen Pen kemudian telah memasuki perjanjian-perjanjian jual beli ('PJB tersebut') untuk menjual dua hartanah tersebut kepada perayu-perayu ('Poh Ean' dan 'Eik Hong') — rumah No 72 kepada Eik Hong dan rumah No 73 kepada Poh Ean — untuk RM130,000 setiap satu. Rumah No 72 telah dipindah milik kepada nama Poh Ean sebagai penama untuk Eik Hong tetapi pindah milik rumah No 73 kepada Poh Ean secara peribadi tidak dilakukan. LADA telah menyaman Pen Pen dan perayu-perayu di Mahkamah Tinggi untuk, antara lain, satu deklarasi bahawa LADA adalah pemilik yang sah, secara benefisial dan saksama ke atas dua hartanah tersebut yan terjatuh di bawah Tanah Rizab Melayu; bahawa PJB Pen Pen dengan perayu-perayu adalah tidak sah dan begitu juga dengan pindah milik rumah No 72 kepada nama Poh Ean; bahawa dua hartanah tersebut patut dipindah milik semula kepada nama LADA kerana ia telah membayar penuh untuk pengambilalihannya; dan bahawa ganti rugi yang kena dibayar oleh Pen Pen dan perayu-perayu kepada LADA perlu ditaksir. Mahkamah Tinggi membenarkan tuntutan-tuntutan LADA dan memutuskan bahawa: (a) dua hartanah tersebut adalah tanah Rizab Melayu; (b) PJB tersebut antara Pen Pen dan perayu-perayu dan pindah milik tanah-tanah tersebut daripada Landrise kepada Pen Pen dan daripada Pen Pen kepada Poh Ean kesemuanya adalah tidak sah di bawah Enakmen Kedah No 63 (Perizaban Melayu) ('Enakmen tersebut'); (c) LADA adalah pemilik benefisial dan saksama dua hartanah tersebut; dan (d) perayu-perayu bukan pembeli-pembeli bona fide tanpa notis tetapi pemegang-pemegang amanah konstruktif untuk LADA. Dalam rayuan ini terhadap keputusan Mahkamah Tinggi, perayu-perayu berhujah bahawa s 6 Enakmen tersebut tidak terpakai kepada kes ini kerana apa yang dibatalkan oleh seksyen tersebut adalah urusan tanah yang dipegang 'by a Malay' kepada mana-mana orang yang bukan Melayu. Ia dihujahkan bahawa dalam kes ini, tanah-tanah yang dipersoalkan adalah semua yang dipegang oleh orang bukan Melayu. Ia juga diutarakan bahawa pejabat tanah telah memindah milik dua hartanah tersebut daripada Landrise kepada Pen Pen tanpa apa-apa isu meskipun kedua-dua pihak bukan Melayu. Akibatnya, ia dihujahkan, Pen Pen telah mengambil alih hakmilik yang baik kepada dua hartanah tersebut dan, akhirnya, mempunyai hak untuk memindah milik dua hartanah tersebut kepada perayu-perayu sebagai pembeli-pembeli bona fide untuk nilai dan akibatnya perayu-perayu memperoleh hakmilik yang tidak disangkal.

Diputuskan, membenarkan sebahagian daripada rayuan, mendapati bahawa

Poh Ean adalah pemilik sah rumah No 72 dan memerintahkan LADA memindah milik hartanah itu kepada Poh Ean dalam tempoh satu bulan dari tarikh perintah ini dan mengesahkan keputusan Mahkamah Tinggi berkaitan rumah No 73:

(1) Mahkamah bersetuju dengan perayu-perayu bahawa s 6 Enakmen tersebut tidak terpakai kepada tanah-tanah yang dipersoalkan. Seksyen 6 memperuntukkan dengan jelas bahawa ia terpakai dalam situasi di mana apa-apa tanah Rizab Melayu dipegang di bawah surat ikatan hakmilik 'by a Malay'. Oleh kerana tanah-tanah dalam kes ini didaftarkan dalam nama Pen Pen, yang tidak diisytiharkan sebagai Melayu menurut s 19 Enakmen tersebut, kebergantungan LADA kepada s 6 untuk menjadikan transaksi tanah tidak sah adalah tidak disangka (lihat perenggan 22).

(2) Mahkamah bersetuju dengan dapatan mahkamah perbicaraan bahawa Pen Pen telah membeli dua hartanah tersebut daripada Landrise menggunakan wang Landrise. Pen Pen sepatutnya telah memindah milik hartanah tersebut kepada LADA tetapi gagal berbuat demikian dan sebalikya secara tidak sah menjual dua hartanah tersebut kepada perayu-perayu. Berhubung hakmilik berdaftar Poh Ean ke atas rumah No 72, pindah milik hakmilik daripada Pen Pen kepada Poh Ean dilindungi oleh s 340 Kanun Tanah Negara ('KTN') dan tidak boleh dikalahkan di bawah s 340(2) KTN kerana fraud, pemalsuan atau salah tanggapan dan lain-lain tidak dipli oleh LADA. Dalam erti kata lain, hakmilik Poh Ean ke atas rumah No 72 mendaki tidak dapat disangkal setelah pendaftaran hakmilik. Oleh kerana rumah No 72 dipindah milik kepada LADA menurut perintah mahkamah perbicaraan, mahkamah ini memerintahkan LADA memindah milik hartanah tersebut kembali kepada Poh Ean dalam tempoh satu bulan dari tarikh perintah ini (lihat perenggan 24–26 & 28).

(3) Berhubung 'rights' Poh Ean ke atas rumah No 73 (yang mana, menurut perintah mahkamah perbicaraan, telah dipindah milik kepada LADA), oleh kerana LADA telah membayar sepenuhnya harga belian untuk hartanah tersebut kepada Pen Pen, LADA adalah pemilik benefisial hartanah tersebut dan Pen Pen menjadi pemegang amanah terdahulu, Pen Pen tidak mempunyai hakmilik yang baik untuk menjual dan memindah milik rumah No 73 kepada Poh Ean dan Poh Ean tidak memperoleh apa-apa kepentingan dalam hartanah tersebut. Mahkamah ini dengan itu memutuskan bahawa pindah milik rumah No 73 kepada LADA telah dilakukan sewajarnya dan bahawa hakmilik LADA kepadanya menjadi tidak boleh disangkal (lihat perenggan 29–30).]

Notes

For cases on Malay reservation in general, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4131–4162.

Cases referred to

Foo Ah Kow & Anor v Yeap Poh Lum & Ors [2015] MLJU 2328; [2016] 6 CLJ 686, CA (refd)
Syarikat Macey Bhd v Nightingale Allied Services (sued as a firm) & Ors [1995] 2 MLJ 411; [1995] 1 CLJ 890, HC (refd)
Tan Ong Ban v Teoh Kim Heng [2016] 3 MLJ 23; [2016] 3 CLJ 193, FC (refd)

Legislation referred to

Kedah Enactment No 63 (Malay Reservations) s 6, 19
Lembaga Pembangunan Langkawi Act 1990
Malay Reservation Enactment (FMS Cap 142) s 8
National Land Code s 340, 340(2), Form 14A

Appeal from: Civil Suit No 22–60 of 2011 (High Court, Alor Setar)

Loo Yook Khin (Law Chambers of YK Loo & Cheng) for the appellants.
Rao Suryana (Rao Suryana) for the respondent.

Umi Kalthum JCA:

INTRODUCTION

[1] At the High Court, the respondent/plaintiff sued the first and second appellants (who were the second and third defendants respectively) and the first defendant (who was not a party to this appeal) for various declarations and orders pertaining to two pieces of land. The learned judicial commissioner (as she then was) ('JC') had allowed the respondent's/plaintiff's claims with costs to be assessed. The second and third defendants appealed against that decision whilst the first defendant did not file any appeal. The intitulement of this appeal and the intitulement of the notice of appeal were therefore allowed orally to be amended by deleting 'Pen Pen Sdn Bhd' as the first appellant, and amending 'Ooi Poh Ean' and 'Ooi Eik Hong' as the first and second appellants respectively.

[2] For ease of reference, parties will be referred to as they were in the court below.

BACKGROUND FACTS

[3] The plaintiff is a statutory corporation established under the Lembaga Pembangunan Langkawi Act 1990 (Act 423). It is entrusted with the responsibility, amongst others, to promote, stimulate, facilitate and undertake economic and social development in the 'Kawasan Lembaga Pembangunan Langkawi'. The plaintiff engaged the first defendant, a private limited company, to construct a ten storey office building for the government and the

A headquarters of the plaintiff for the contract sum of RM23,982,290.05. For this purpose, the plaintiff and the first defendant entered into a contract dated 15 May 1993 ('original contract').

B **[4]** Vide a variation order No 2 (additional) and the Superintending Officer's Directive No 18 dated 19 October 1993, Bill No 2 PC and Provisional Sums, Perakuan Pelarasan Jumlah Harga Kontrak No 2 (Tambahan) and *lampiran* A attached to the said *perakuan pelarasan* No 2, the superintending officer had directed the first defendant to modify the original contract so as to provide for the purchase of two units of double-storey houses as additional to C the original contract at additional costs of RM240,240.75. The original contract was, however, amended to add in the purchase of two units of double-storey houses on behalf of the plaintiff to be used as the office of the first defendant or as site office.

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[5] Pursuant to the amended contract, the first defendant bought two units of double-storey terrace houses from the developer, Landrise Development Sdn Bhd at Nos 72 and 73, Taman Seri Berlian, Kuah, Langkawi on land described as GM 4773, Lot 3524 (previously known as HS(M) 2847, PT 1984) (house E No 72) (Lot 3524) and GM 5657, Lot 3525 (previously known as HS(M) 2848, PT 1985) (house No 73) (Lot 3525), both land are in the Mukim of Kuah, Langkawi (the properties/the land). The total purchase price of both houses was RM240,240.75, which was fully paid for.

F **[6]** The first defendant then gave vacant possession of the two houses to the plaintiff but without transferring the titles of the properties to the plaintiff. The plaintiff rented out the properties to its employees from time to time since 1996. To date the plaintiff retains physical possession of the properties and G collected rental payments for them.

[7] On 26 August 1995, the first defendant and the second defendant entered into a sale and purchase agreement in respect of Lot 3525/house No 73 for a consideration of RM130,000 with completion date set at within two years H from the date of the agreement. The second defendant paid a deposit of RM40,000 and lodged a private caveat on Lot 3525 on 13 September 2005. On 19 June 2007, Form 14A dated 30 May 2007 (for the transfer of the said land to the second defendant) was presented for adjudication but the transfer was prevented by a caveat lodged by the plaintiff on 13 June 2007 and another I individual on 24 May 2007.

[8] On 14 June 2005, the first defendant and the third defendant signed a sale and purchase agreement in respect of Lot 3524/house No 72 for a purchase price of RM130,000 with completion date to be within two years from the date

of the agreement. The third defendant paid a deposit of RM70,000 and lodged a private caveat on 27 June 2005. On 11 August 2005, the third defendant paid the balance purchase price of RM60,000 to the first defendant and the Form 14A was presented for adjudication and transfer on 19 June 2007 but was prevented from being registered because of the existence of the plaintiff's caveat lodged on 13 June 2007 and by another individual on 24 May 2007.

[9] The plaintiff made a search and discovered that the second and third defendants had lodged private caveats in respect of the properties, where they alleged that they had bought the respective properties from the first defendant and had signed a memorandum of transfers in respect of the properties. The plaintiff subsequently lodged a private caveat caveat presentation No 291/2007 in respect of the properties ('caveat').

[10] On 25 March 2008, the second and third defendants filed an Originating Summons Nos 24–1265 of 2008 and 24–1264 of 2008 respectively to remove the caveat lodged by the plaintiff. The caveat was eventually removed by order of court.

[11] At the time of the trial of the suit, the second defendant had become the registered owner of Lot 3524/house No 72 as nominee of the third defendant. Lot 3525/house No 73 was not registered in the second defendant's name.

[12] In the plaintiff's suit, the plaintiff prayed for the following in para 21:

(1) Suatu deklarasi bahawa pada semua masa yang material *Plaintif adalah pemilik sah, benefisial dan berekuiti* ke atas 2 keping hartanah berstatus *Tanah Rizab Melayu* masing-masing yang dipegang di bawah GM 4773, Lot No 3524 (dahulunya dikenali sebagai HS (M) 2847, PT 1984), Mukim Kuah, Daerah Langkawi, Kedah dan GM 5657, Lot No 3525 (dahulunya dikenali sebagai HS (M) 2848 PT 1985), Mukim Kuah, Daerah Langkawi, Kedah berserta bangunan-bangunan yang didirikan di atasnya (selepas ini dirujuk bersesama sebagai 'kedua-dua hartanah tersebut');

(2) Suatu deklarasi bahawa tindakan Defendan Pertama memasuki *perjanjian jual beli atau perjanjian untuk memindahmilik kedua-dua hartanah* tersebut dengan Defendan-defendan Kedua dan Ketiga masing-masing adalah tidak sah dan terbatal;

(3) Suatu deklarasi bahawa *Memorandum PindahMilik bertarikh 30/5/2007* yang ditandatangani di antara Defendan Pertama dengan Defendan Kedua dalam perkara hartanah yang dikenali sebagai GM 4773 Lot No 3524 (dahulunya dikenali sebagai HS (M) 2847, PT 1985,) Mukim Kuah, Daerah Langkawi, Kedah tersebut adalah tidak sah dan terbatal;

(4) Suatu deklarasi bahawa *pendaftaran Memorandum Pindahmilik* bertarikh 30/5/2007 tersebut pada 21/3/2010 di bawah *Perserahan No 353/2010*

oleh Defendan Pertama kepada Defendan Kedua dalam perkara hartanah yang dikenali sebagai GM 4773 Lot No 3524 (dahulunya dikenali sebagai HS (M) 2847, PT 1985,) Mukim Kuah, Daerah Langkawi, Kedah adalah tidak sah dan terbatal;

(5) Suatu Perintah untuk *perlaksanaan spesifik* supaya Defendan-defendan sekarang memindahmilikkan kedua-dua hartanah tersebut ke atas nama Plaintif atas balasan yang telahpun dibuat oleh Plaintif kepada Defendan Pertama tersebut dalam tempoh 2 bulan dari tarikh Perintah di sini;

(6) Secara alternatifnya, Penolong Kanan Pendaftar Mahkamah Tinggi di sini di beri kuasa untuk menandatangani dan menyempurnakan Memorandum PindahMilik kedua-dua hartanah tersebut kepada Plaintif;

(7) Suatu Perintah bahawa Pentadbir Tanah Langkawi hendaklah mengambil segala dan/atau apa-apa tindakan yang perlu bagi mendaftarkan pindahmilik kedua-dua hartanah tersebut kepada Plaintif;

(8) Secara alternatifnya, suatu perintah untuk taksiran gantirugi atas kehilangan tanah-tanah tersebut akibat tindakan Defendan Pertama menjual dan memindahmilik tanah-tanah tersebut secara salah kepada Defendan-defendan Kedua dan Ketiga di sini, dibayar oleh Defendan Pertama kepada Plaintif;

(9) Suatu Deklarasi bahawa *Kaveat Persendirian No Perserahan 448/2005* yang dimasukkan oleh *Defendan Kedua* pada 13/9/2005 ke atas hartanah yang dikenali sebagai GM 5657, Lot No 3525 (dahulunya dikenali sebagai HS (M) 2848, PT 1985, Mukim Kuah, Daerah Langkawi, Kedah adalah tidak sah dan terbatal; atau

(10) Secara alternatifnya, suatu perintah bahawa Kaveat Persendirian No Perserahan 448/2005 tersebut dibatalkan oleh Mahkamah yang mulia ini di sini;

(11) Suatu Perintah bahawa Pentadbir Tanah Langkawi hendaklah mengambil segala langkah-langkah yang perlu untuk mendaftarkan Perintah Mahkamah yang membatalkan Kaveat Persendirian No Perserahan 448/2005 di atas;

(12) Suatu *taksiran* dibuat di hadapan Penolong Kanan Pendaftar bagi menentukan gantirugi dan kos yang perlu dibayar oleh Defendan-defendan masing-masing kepada Plaintif kerana memasukkan *kaveat* secara salah dan memindahmilik secara salah dalam perkara kedua-dua hartanah tersebut di sini;

(13) Faedah pada kadar 8% setahun ke atas jumlah taksiran dari tarikh Perintah di sini sehingga tarikh pembayaran dan/atau penyelesaian penuh jumlah tersebut;

(14) Kos bagi permohonan ini dan mana-mana kos sampingan baginya dibayar oleh Defendan-defendan kepada Plaintif; dan

(15) Lain-lain perintah atau relif yang difikirkan adil dan suaimanfaat oleh Mahkamah yang mulia ini.

AT THE HIGH COURT

[13] The learned JC addressed three issues to be decided by her as follows:

(a) the status of the properties involved (whether Malay reserve land);

(b) whether there was a contract between the plaintiff and the first defendant to purchase the properties; and

(c) whether the sale and purchase agreements between the first and the second defendant and between the first defendant and the third defendant are valid contracts.

[14] With regard to the first issue, the learned JC found the properties to be Malay reserve land based on exhs P28 and P29, which are *geran mukim*/the issue document of titles in respect of Lot 3524 and Lot 3525 respectively. In P28 and P29, it was clearly stated that the said lots are declared Malay reserve land since 4 April 1993 vide *Gazette* Notification 1180. That since the defendants did not adduce evidence that they had been declared as Malays/Siamese pursuant to s 19 of the Kedah Enactment No 63 (Malay Reservations) ('the Enactment'), the transfer of title from the developer/Landrise Development Sdn Bhd to the first defendant was invalid and similarly the transfer of title from the first defendant to the second defendant was also invalid.

[15] As for the second issue, the learned JC found that based on the testimonies of SP1, SP2, SP4, SP5, SP7 and SP8 for the plaintiff and which testimonies were supported by the defendants' witness SD1 (who was the director of the first defendant), there was a contract between the plaintiff and the first defendant to purchase the properties. That, therefore, the defendants were constructive trustees of the plaintiff. The learned JC also found the second and third defendants were not bona fide purchasers without notice.

[16] Since the learned JC had found that the properties are Malay reserve land, and there was a contract between the plaintiff and the first defendant to purchase the properties for which the plaintiff had fully paid the purchase price to the first defendant and who in turn had paid the developer the purchase price, the learned JC found that the plaintiff is the beneficial and equitable owner of the properties. Since the second and third defendants are not Malays, the sale and purchase agreements between the first defendant and the second defendant and between the first defendant and the third defendant were invalid and void under the Enactment.

[17] Based on her findings of facts, the learned JC allowed the plaintiff's claim in para 21(1), (2), (3), (4), (5), (7), (9), (11), (12) and (13) with costs to be assessed. The second and third defendants now appealed against the said decision.

DECISION OF THE COURT

[18] With regard to the status of the land/properties, it was submitted for the second and third defendants/appellants that based on the *geran mukim* in P28 (in respect of Lot 3524) and P29 (in respect of Lot 3525), it was wrong for the learned JC to have held that the status of the said land as Malay reserve land since it had been clearly endorsed on the *geran* as follows:

> Tanah yang diperihalkan di atas adalah dipegang *untuk selama-lamanya* oleh tuan punya pada masa namanya disebut dalam rekod ketuanpunyaan di bawah, tertakluk kepada peruntukan-peruntukan Kanun Tanah Negara, kepada kategori yang dinyatakan di atas dan kepada syarat-syarat nyata dan sekatan-sekatan kepentingan yang dinyatakan di bawah, sebagai balasan bagi pembayaran cukai tahunan yang sewajarnya. (Emphasis added.)

That is to say that the status of the said land is as freehold land, notwithstanding the fact that it was not disputed that the land titles had been endorsed 'Pengisytiharan Rezab Melayu'. That endorsement was merely for office purposes. The 'freehold' status was further reflected in the private searches P14 and P16.

[19] Learned counsel for the second and third defendants referred to the definition of 'Reservation Land' in the Enactment as follows:

> 'Reservation Land' means land situate within an area which has under the provisions of Section 3 or Section 4 been declared to be, or to be included in a Malay Reservation, such declaration not having been revoked.

Section 6 of the Enactment was also referred to as follows:

> 6(1) Save as hereinafter provided in this Enactment, *where any Reservation land is held under a document of title by a Malay, no right or interest therein shall vest,* whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, *in any person who is not a Malay* and where any Reservation land is held under a document of title by a Siamese no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a charge or otherwise, in any person who is not either a Malay or a Siamese.
>
> (2) Any document or agreement purporting to vest in any person any right or interest contrary to the provisions of sub-section (1) shall be void. (Emphasis added.)

[20] It was the defendants' submission that the said s 6 does not apply to the land as s 6 prohibits the dealing of land which is a Malay reserve land *and held*

by a Malay to any other person who is *not a Malay*. However, the land in issue are land which had been declared as Malay reservation land *but* held by a non-Malay, that is, the first and second defendants. Therefore s 6 of the Enactment does not apply to the land. Moreover, there were no evidence to support the plaintiff's contention that Lot 3524 and Lot 3525 were held by a Malay prior to the declaration of the land to be Malay reservation land. Instead, it was proved vide P22 that the land were purchased by the first defendant from the developer Landrise Development Sdn Bhd, which had not been proved to have been declared a 'Malay' under the Enactment.

[21] It was further submitted that as there were no issue raised regarding the transfers of the land from Landrise Development Sdn Bhd to the first defendant and the fact that the said transfers were allowed by the land administrator, proved beyond doubt that the transfers were legal and that the first defendant had obtained good titles over the land and its titles are indefeasible. Since its titles over the land are indefeasible, the first defendant had the right to transfer the land to the second and third defendants as bona fide purchasers for consideration and they have indefeasible titles to the land respectively. Learned counsel cited the case of *Syarikat Macey Bhd v Nightingale Allied Services (sued as a firm) & Ors* [1995] 2 MLJ 411; [1995] 1 CLJ 890 as being an authority for his submission based on similar provisions of s 8 of the Malay Reservation Enactment (FMS Cap 142) to s 6 of the Enactment.

[22] We agreed with the submission of learned counsel for the second and third defendants in so far as it related to the non-applicability of s 6 of the Enactment to the land. Section 6 of the Enactment provides very clearly that it applies in a situation (for the purposes of this appeal) 'where any Reservation land is held under a document of title *by a Malay* ...'. Since the land was registered in the first defendant's name, who had not been declared to be a Malay pursuant to s 19 of the Enactment, we concluded that the plaintiff's reliance on s 6 of the Enactment to invalidate the land transactions was misconceived.

[23] The question therefore arose whether the first defendant was the rightful owner of the land or whether it held the land as bare trustee for the plaintiff. This then entailed us to address the issue of whether there was a contract between the plaintiff and the first defendant in which the plaintiff had, as part of the original contract, included the purchase of the land/properties by the first defendant from the developer on behalf of the plaintiff.

[24] We agreed with the findings of fact by the learned JC that the original contract, as varied subsequently vide Variation Order No 2 (Additional) and the Superintending Officer's Directive No 18 dated 19 October 1993, Bill

No 2 PC and Provisional Sums, *Perakuan Pelarasan Jumlah Harga Kontrak No 2 (Tambahan)* and *lampiran* A attached to the said *Perakuan Pelarasan No 2*, did provide for the purchase of the land/properties by the first defendant for the plaintiff. The land/properties were bought by the first defendant with the plaintiff's money and was meant to be purchased by the first defendant on behalf of the plaintiff. Below is what the learned JC found:

(2) Samada wujud kontrak antara Plaintif dan Defendan

Keterangan SP1

(a) SP1 (En Ngiam Swee Beng) memberitahu Mahkamah bahawa Plaintif telah memberi arahan kepada Pen Pen untuk membeli 2 unit rumah teres 2 tingkat itu untuk digunakan sebagai *site office* dan untuk kegunaan kediaman pekerja Plaintif. Arahan itu diberikan dalam bentuk perubahan kerja yang mana Pen Pen (Defendan Pertama) dikehendakki membuat pembelian itu.

Keterangan SP2

(b) SP2 (En Mohd Fadzillah bin Mohd Ali) mengatakan bahawa 'Sebagai *Superintending officer* dan arkitek projek tersebut (S/O), pada peringkat awal LADA nak beli (buat rumah sahaja dengan harga RM135,000.00. Bila kontrak telah bermula, LADA beritahu bahawa LADA akan beli 1 lagi. Jadi Perintah Perubahan dikeluarkan untuk beli 2 buah rumah atas arahan LADA'.

(c) SP2 telah merujuk kepada Ekshibit P2, iaitu perjanjian yang ditandatangani oleh Plaintif dan Defendan Pertama pada 15.5.1993 untuk membina 10 tingkat bangunan pejabat kerajaan dan Ibu Pejabat Lembaga Pembangunan Langkawi (LADA) bernilai RM23,982,290.05 dan juga Perakuan Perubahan Kerja (Ekshibit P5) yang mana telah berlaku perubahan kerja dan jumlah kontrak telah bertambah kepada RM27,480,889.85 (Ekshibit P3).

(d) Pembelian 2 unit rumah berkembar jelas tertera di muka surat 10 Ikatan D yang melibatkan penambahan sebanyak RM240,240.75 yang diarahkan oleh Pegawai Penguasa (Ekshibit P4). Keterangan SP2 mengenai perubahan kerja ini disokong oleh SD1 Encik Ooi Teong Ngee, Pengarah Syarikat Defendan Pertama bahawa P4 adalah arahan perubahan kerja. Untuk pembelian rumah itu LADA telah memberi duit kepada Defendan Pertama untuk dibayar kepada Pemaju, Landrise.

Keterangan SP4

(e) SP4 (En Mohd Ali bin Makkit) yang bertugas dengan LADA dan dipinjamkan kepada Syarikat Panorama Langkawi Sdn Bhd sebagai Ketua Pegawai Operasi telah menyewa rumah No: 73 dan setiap bulan beliau membayar sewa kepada LADA sebanyak RM75.00 dan sekarang dinaikkan kepada RM115.00. Rujuk Ekshibit P12. Menurut SP4, rumah No: 72 disewakan kepada Puan Mahani binti Mohamad, seorang Pegawai Perancang Bandar di LADA. Rujuk Ekshibit P11.

Keterangan SP5

(f) Menurut SP5 (Pn Norsiah binti Baharin) Penasihat Undang-Undang LADA, cukai pintu rumah No 72 dan 73 dibayar oleh LADA sehingga sekarang. Bukti

bayaran cukai pintu ini dikemukakan sebagai Ekshibit P32A & B yang tertera di muka surat 32 dan 33 Ikatan D.

Keterangan SP7 — Jurutera JKR, bertugas di LADA pada 1994 sehingga 2009

(g) SP7 (En Mohd Nasir bin Abd Hamid) yang bertugas sebagai Jurutera JKR, bertugas di LADA pada 1994 sehingga 2009 dalam keterangannya memberitahu Mahkamah bahawa rumah No: 72 dan 73 dibeli oleh LADA sebagai perubahan kerja. Pembinaan telah bermula pada tahun 1994 dan siap pada tahun 1996.

Keterangan SP8

(h) SP8 (Pn Azura binti Ahmad Tajudin) Penolong Akauntan, LADA menyatakan bahawa pihak Plaintif telah membuat bayaran bagi pembinaan kedua-dua rumah di No: 72 dan 73 itu. Ekshibit P6A-J menunjukkan jumlah bayaran oleh Plaintif kepada Pen Pen adalah RM240,240.75 iaitu jumlah perubahan kerja yang dilakukan oleh Defendan Pertama atas arahan Plaintif.

Keterangan saksi-saksi Plaintif bagi membuktikan bahawa kedua-dua hartanah tersebut dibeli oleh Plaintif melalui perubahan kerja dalam kontrak yang ditandatangani oleh Plaintif disokong oleh saksi Defendan yang mana menurut SD1 En Ooi Teong Nghee yang memberitahu Mahkamah bahawa semasa beliau mengurus projek ini, LADA telah memberi arahan kepadanya supaya harga rumah RM240,240.75 itu dibayar oleh Plaintif daripada wang peruntukan kontrak melalui resit rasmi No: 1025 yang dikeluarkan oleh Landrise dan diberi kepada Pen Pen. Bayaran itu dibuat oleh LADA kepada Syarikat Pen Pen untuk Pen Pen bayar kepada Pemaju.

(i) SD2 pula sebaliknya mendakwa bahawa bayaran di ekshibit P6A–J adalah bayaran oleh Defendan Pertama kepada kontraktor (Landrise). Defendan Pertama beli rumah itu untuk tujuan pelaburan. SD1 mendakwa bahawa Pen Pen (Defendan Pertama) tidak menduduki rumah itu tetapi disewakan kepada kakitangan LADA.

(j) SD1 mengetahui bahawa rumah tersebut diduduki oleh kakitangan LADA. Walaupun begitu SD1 mengaku bahawa Defendan Pertama tidak pernah memberi notis kepada penyewa (kakitangan LADA) yang tinggal dirumah itu tanpa bayaran sewa. Mahkamah merasa sangsi dengan jawapan SD1 apabila disoalbalas oleh peguam Plaintif kenapa tidak kutip sewa daripada kakitangan LADA yang menyewa rumah No: 72 dan 73. 'Defendan Pertama tidak minta sewa kerana jika Defendan Pertama berbuat demikian akan menjejaskan hubungan Defendan dengan LADA sebab LADA adalah pihak yang berkuasa'. Sebaliknya SD1 mengambil langkah menjual rumah itu kepada orang lain dengan tujuan untuk menghalau penyewa-penyewa itu.

Keterangan SD2

(k) S[D]2 (Pn Ooi Poh Ean) seorang suri rumahtangga dalam keterangannya mengatakan beliau telah membeli rumah itu dan pada masa itu status hartanah hartanah itu adalah *free from encumbrances.* Walau bagaimanapun SD2 gagal untuk mengemukakan resit pembelian rumah itu dan juga bukti carian bahawa Lot 72 dan 73 adalah *free from encumbrances.* Semasa memberi keterangan SD2

berjanji untuk mengemukakan kedua dua bukti itu tetapi sehingga akhir perbicaraan kes ini beliau telah gagal untuk berbuat. SD2 juga mendakwa bahawa beliau mengetahui bahawa ada kakitangan LADA yang tinggal di rumah itu dan 2 notis dikeluarkan supaya penyewa rumah (kakitangan LADA) keluar daripada rumah tersebut tetapi notis-notis itu tidak dibawa sebagai bukti dalam perbicaraan. SD2 akui bahawa D38 (muka surat 97 Ikatan F) bukanlah notis yang beliau maksudkan.

Selain daripada keterangan di atas tidak dinafikan bahawa bayaran cukai tanah hartanah tersebut dibayar oleh Plaintif, sewa rumah juga dibayar kepada Plaintif oleh dua orang kakitangannya. Rumah diduduki oleh Pegawai/Kakitangan Plaintif. Oleh itu, Plaintif ada hak ekuiti [terhadap] hartanah dan rumah tersebut.

[25] Since we agreed with the findings of the learned JC that the land/properties were purchased by the first defendant on behalf of the plaintiff, the first defendant should have transferred the properties to the plaintiff when the properties were transferred to the first defendant by the developer/Landrise Development Sdn Bhd. The first defendant failed to do so, but instead, the first defendant had unlawfully sold the properties to the second and third defendants. What then are the positions of the second and third defendants vis the properties seeing that the second defendant/first appellant had become the registered owner of Lot 3524/house No 72 as nominee of the third defendant, whilst Lot 3525/house No 73 had not been registered in the second defendant's name?

[26] With regard to the second defendant's/first appellant's registered title over Lot 3524/house No 72, we were of the view that the transfer of the title from the first defendant to the second defendant was protected by s 340 of the National Land Code ('the NLC') and could not be defeated under s 340(2) of the NLC since fraud, forgery or misrepresentation etc was not pleaded by the plaintiff. In other words, the second defendant's title to Lot 3524/house No 72 had become indefeasible upon the registration of his title. The relevant parts of s 340 of the NLC are as follows:

340 Registration to confer indefeasible title or interest, except in certain circumstances

(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisionsof this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible —

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) —

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser ...

[27] The plaintiff instead pleaded in the main that the properties are Malay reservation land and could not be sold to non-Malays. We had earlier stated that this approach by the plaintiff was misconceived.

[28] We would therefore allow part of the appeal in respect of the second defendant's/first appellant's title to Lot 3524/house No 72. Since the order of the High Court dated 26 November 2013 the said title had been transferred to the plaintiff's name, we therefore ordered the plaintiff to transfer the said Lot 3524/house No 72 to the second defendant/first appellant within one month from our order (19 March 2015).

[29] With regard to the second defendant's/first appellant's 'rights' over Lot 3525/house No 73, the title to the said lot had, since the High Court order dated 26 November 2013, been transferred to the plaintiff's name. We were of the view that since the plaintiff had paid the full purchase price for the said Lot 3525 to the first defendant, the plaintiff is the beneficial owner of the said Lot 3525 and that the first defendant had become a bare trustee of the said lot for the benefit of the plaintiff. The Federal Court in *Tan Ong Ban v Teoh Kim Heng* [2016] 3 MLJ 23; [2016] 3 CLJ 193, per Arifin Zakaria CJ (as he then was), had the occasion to expound on the principle of beneficial ownership, at p 35 (MLJ); p 205 (CLJ), as follows:

The Principle Of Beneficial Ownership

[33] We will begin with an elucidation of the principle of beneficial ownership which we think is crucial to this case. This principle of beneficial ownership was alluded to by Edgar Joseph JR in *Borneo Housing Mortgage Finance Bhd* where he observed:

... the contractual events which result in the vendor becoming a bare trustee of the land the subject matter of the agreement of sale and purchase for the

purchaser, is on completion, that is to say, *upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form, in favour of the purchaser,* for it is then the vendor divest himself of his interest in the land. (Emphasis added.)

[34] According to this principle, *when a purchaser of a property has performed his or her contractual obligation upon the full settlement of the purchase price* besides executing all the formal documents to effect the registration of ownership, *equity accords him or her with all the rights and privileges of a legal owner over the property. The purchaser thus enjoys the benefit of being the owner of the acquired property even though he or she has yet to become its registered owner*.

...

[36] The principle of beneficial ownership differentiate between the rights of a purchaser of a property who has fully settled the purchase price with one who has not. This principle clothes a purchaser who has settled the full purchase price with a distinct privilege equivalent to a legal owner, although he or she has yet to be registered as the proprietor of the property.

[37] *Under this principle of beneficial ownership, the vendor becomes a bare trustee for the purchaser in respect of the transacted property, while the purchaser assumes the position of beneficial owner having right in rem over the property*. The purchaser is commonly accepted as having a beneficial interest in the land on the execution of the contract and upon which specific performance may be granted by the court. This beneficial interest is also sufficient to entitle the purchaser to enter a caveat under the NLC. (Emphasis added.)

[30] Being a bare trustee to the plaintiff, the first defendant had no good title to sell the said Lot 3525 to the second defendant/first appellant in the first place, let alone to transfer good title of the said Lot 3525 to the second defendant/first appellant. (The first defendant had not appealed against this correct finding of the learned JC.) The maxim *nemo dat quod non habet* (or no one gives who possesses not) thus applied in the circumstances. Consequently, the second defendant/first appellant could not have acquired any interest in the said Lot 3525 (see also *Foo Ah Kow & Anor v Yeap Poh Lum & Ors* [2015] MLJU 2328; [2016] 6 CLJ 686 (CA)). We agreed with the learned JC's finding in regard to Lot 3525. We therefore hold that the transfer of the said Lot 3525 title to the plaintiff was correctly done and the plaintiff's title to it is now indefeasible.

CONCLUSION

[31] For the reasons stated above, we unanimously allowed the appeal in part in that we found that the second defendant/first appellant is the rightful owner of Lot 3524/house No 72, and we consequently ordered the plaintiff to transfer the title to Lot 3524/house No 72 to the second defendant/first appellant/Ooi Poh Ean within one month from the date of this court's order (19 March

2015). We affirmed paras 5 and 6 of the High Court order dated 26 November 2013 only in respect of Lot 3525/house No 73. We ordered each party to bear their own costs for here and below and the deposit to be refunded to the second and third defendants/appellants.

Order accordingly.

Reported by Ashok Kumar